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ABSTRACT

A student's right to freedom of expression was well-protected by twenty years of legal history until the United States Supreme Court in its 1988 decision Hazelwood School District, et al. v. Kuhlmeier, et al. sharply limited this right by approving a school district's censorship of a high school newspaper. Prior to the Kuhlmeier decision courts often used the "public forum" doctrine to uphold freedom of speech or expression. No censorship of expression occurring in a public forum is allowed. School publications were held to be public forums, and absent a showing of "material and substantial interference with school work or discipline" schools could not restrain the full First Amendment rights of their students. The Kuhlmeier decision held that the school newspaper was not a public forum because the school exerted control over it, and therefore the school's actions were justified as long as they were "reasonably related to legitimate pedagogical concerns." Although this decision has undone 20 years of federal law, some states have their own laws protecting the student press. These laws remain untouched by the Kuhlmeier decision. Furthermore, the Kuhlmeier decision arguably does not affect independent (non-school sponsored) publications at the secondary level or college publications. (Extensive footnotes are included.) (MHC)

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END OF AN ERA?: THE DECLINE OF STUDENT PRESS RIGHTS IN THE WAKE OF THE KUHLMEIER DECISION

By: J. Marc Abrams*
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I. INTRODUCTION

Almost twenty years ago, in the case involving the use of black arm bands by high school and junior high school students to express their opposition to the Vietnam war, the Supreme Court so eloquently stated "it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[1] Since that statement in 1969, almost every court that has faced the question of student press rights has started their analysis with the Tinker decision and they all have found student journalism entitled to extensive First Amendment protection. Many of these courts used the "public forum doctrine" as the basis for its analysis.[2]

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1. Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506 (1969).

2. See, e.g., Stanton v. Brunswick School Department, 577 F. Supp. 1560 (D. Me. 1984); Gambino v. Fairfax County School Board, 429 F. Supp. 731 (E.D. Va. 1977), aff'd per curiam

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Recognizing that the suppression of content by school authorities is in essence a denial of access to the pages of the student newspaper, these courts relied on the analysis that has been applied to public auditoriums[3] and public university facilities.[4]

The public forum doctrine was developed to assure that once the state established a "forum" for public discourse or expression, it would not censor speech or speakers absent highly compelling circumstances.[5] As such, the doctrine had a logical application to school-sponsored student newspapers that were avenues for the expression of student news and viewpoints.

However, on January 13, 1988, the Supreme Court of the United States announced its decision in Hazelwood School District,

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564 F.2d 157 (4th Cir. 1977); Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969); Panarella v. Birenbaum, 37 A.D.2d 987, 327 N.Y.S.22d 755 (N.Y. App. Div. 1971), aff'd, 32 N.Y.2d 108, 296 N.E.2d 238, 343 N.Y.S.2d 333 (N.Y. 1973). Other cases have seemingly applied a forum analysis without specifically referring to it as such. See, e.g., Schiff v. Williams, 519 F.2d 257 (5th Cir. 1975); Joyner v. Whiting, 477 F.2d 456 (4th Cir. 1973); Bazaar v. Fortune, 476 F.2d 570, aff'd en banc per curiam, 489 F.2d 225 (5th Cir. 1973), cert. denied, 416 U.S. 995 (1974); Korn v. Elkins, 317 F. Supp. 138 (D. Md. 1970); Dickey v. Alabama State Board of Education, 273 F. Supp. 613 (M.D. Ala. 1967), dismissed as moot sub. nom., Troy State v. Dickey, 402 F.2d 515 (5th Cir. 1968).

3. Southeastern Productions, Ltd. v. Conrad, 420 U.S. 546 (1975).

4. Widmar v. Vincent, 454 U.S. 263 (1981).

5. Cornelius v. NAACP Legal Defense and Education Fund, 473 U.S. 788, 800, 105 S. Ct. 3439, 3449 (1985).

et al. v. Kuhlmeier, et al.[6] That opinion sharply limited the rights of students who operate newspapers in public schools as part of a curriculum. As we will discuss below, it is not an overstatement to assert that the Kuhlmeier decision eviscerates the decision of the Supreme Court in Tinker, overrules many lower court decisions protective of student press freedoms, and rolls back student press rights over a generation. However, the decision is also notable for what it does not say, and because of that, avenues for free expression by high school students remain. Although Kuhlmeier dealt with a school-sponsored newspaper, the case also casts uncertainty upon the status of independently run student newspapers and student newspapers at the college level. We will argue that neither of these categories of student newspaper are affected by the Kuhlmeier decision. They retain the vitality provided them by the history of student press litigation in the past twenty years.

II. STUDENT PRESS FIRST AMENDMENT RIGHTS, 1969-1988.

Nearly 20 years ago, the United States Supreme Court first explicitly recognized that public school students enjoy First Amendment protections.[7] Although the decision in

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6. ___ U.S. ___, 56 U.S.L.W. 4079 (1988).

7. Tinker v. Des Moines Independent School Community District, 393 U.S. 503 (1969) (hereinafter "Tinker").

Tinker involved the issue of symbolic expression in a high school and a junior high school, the Supreme Court and other courts subsequently applied constitutional principles to cases involving the student press at the high school and college levels.[8]

In other contexts, the Court adopted a "forum" analysis as a means of determining when the government's interest in limiting its use of property or facilities to some intended purpose outweighed the interest of those wishing to use it for other purposes.[9] The Court stated that "a public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects."[10]

Moreover, the Court ruled that if a state established a "public forum," it could not censor the expression which took place in that forum.[11] Thus, for example, if a city were to allow plays, speeches or meetings at a civic auditorium, that auditorium would be a "public forum," and the city would violate

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8. Papish v. Board of Curators of University of Missouri, 410 U.S. 667 (1973); Fujishima v. Board of Education, 460 F.2d 1355 (7th Cir. 1972); Gambino v. Fairfax County School Board, 429 F. Supp. 731 (E.D. Va. 1977), aff'd per curiam, 564 F.2d 157 (4th Cir. 1977) (hereinafter "Gambino").

9. See, e.g., Cornelius v. NAACP Legal Defense and Education Fund, 473 U.S. 788, 800, 105 S. Ct. 3439, 3448 (1985).

10. Id. at 3449.

11. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).

the Constitution if it were to deny use of the auditorium for the production of a play solely because it would offend the sensibilities of city officials.[12] The same principle was used to recognize as public forums city parks, school auditoriums and airports, and to guarantee that groups such as the Hare Krishnas or the Nazi party had the right to engage in expressive activities in those forums free of government censorship.[13]

Further, the Supreme Court consistently and unambiguously stated that prior restraints on expression were among the most disfavored acts in our constitutional system.[14] This was, presumptively, no less true in our nation's public schools.[15]

After Tinker, the Supreme Court handed down several decisions dealing with this free speech rights of students. While all but one of these cases dealt with college students, the rules announced were seemingly equally applicable in the high school setting. In Healey v. James,[16] the court held that a college

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12. Id.

13. National Socialist White People's Party v. Ringers, 473 F.2d 1010 (4th Cir. 1973); Fernandes v. Limmer, 465 F. Supp. 493 (N.D. Tex. 1979), modified, 663 F.2d 619 (5th Cir. 1981), cert. dismissed, 458 U.S. 1124 (1982); Collin v. Smith, 447 F. Supp. 676 (N.D. Ill.) aff'd, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978).

14. See, e.g., Nebraska Press Association v. Stuart, 427 U.S. 539, 559 (1976); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963).

15. Tinker, 393 U.S. 503.

16. 408 U.S. 169 (1972).

could not refuse to recognize a group merely because it disagreed with the group's philosophy or because it had an undocumented fear of school disruption. In Papish v. Board of Curators of University of Missouri,[17] decided a year later, a college student was expelled for distributing a highly offensive newspaper on campus. The paper carried a political cartoon which depicted policemen raping the Statue of Liberty and the Goddess of Justice and a headline announcing "Mother Fucker Acquitted." In concluding that the expulsion violated Papish's First Amendment rights, the Court held that the newspaper was not "obscene," and was not likely to cause a disruption of the school and therefore could not be censored. And in a 1981 case, Widmar v. Vincent,[18] the Supreme Court held that a state university policy prohibiting the use of otherwise generally available school facilities for religious workshops or religious teaching violated students' rights to freedom of speech and association.

Other courts also recognized the existence of forums in public schools and applied strong limitations to censoring activities of school officials. These courts recognized that determining whether a student activity was curricular or extra curricular, school-sponsored or student-sponsored, was irrelevant if a forum was found to exist. One court stated that labelling an outlet for student expression as an "instructional

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17. 410 U.S. 667 (1973).

18. 454 U.S. 263 (1981).

tool" would not allow school administrators unbridled control when a forum was in fact created.[19] Another court stated that "the state is not necessarily the unrestrained master of what it creates and fosters."[20] And several courts specifically found that when a school gave students an opportunity to speak to a relevant public on issues that concerned them, even though it occurred on school grounds and for school credit and involved the use of school funds and facilities, the school had created a free speech forum for student expression that could be controlled only according to constitutional dictates.[21]

Thus, courts have recognized that official school newspapers were forums for student expression entitled the protection of the First Amendment if they were something more than a "mere activity time and place sheet."[22] Using this rationale, courts have upheld the rights of student journalists

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19. Trujillo v. Love, 322 F. Supp. 1266, 1268 (D. Colo. 1971).

20. Antonelli v. Hammond, 308 F. Supp. 1329, 1337 (D. Mass. 1970).

21. Bazaar v. Fortune, 476 F.2d 570, aff'd en banc per curium, 489 F.2d 225 (5th Cir. 1973), cert. denied, 416 U.S. 995 (1974); Stanton v. Brunswick School Department, 577 F. Supp. 1560 (D. Me. 1984); Reineke v. Cobb County School District, 484 F. Supp. 1252 (N.D. Ga. 1980); Gambino v. Fairfax County School Board, 429 F. Supp. 731; Bayer v. Kinzler, 383 F. Supp. 1164 (E.D.N.Y. 1974), aff'd without op., 515 F.2d 504 (2d Cir. 1975); Lee v. Board of Regents, 306 F. Supp. 1097 (W.D. Wis. 1969), aff'd, 441 F.2d 1257 (7th Cir. 1971); Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969).

22. Zucker, 299 F. Supp. 102 (S.D.N.Y. 1969).

to publish a four-letter reference to a university president,[23] a photograph of a burning American flag,[24] an editorial calling for continued racial segregation of the university,[25] advertisements concerning race relations, unionization and the Vietnam war,[26] criticism of a governor and a state legislature,[27] articles by non-students containing profanity,[28] and scathing attacks (termed "blasphemous" by the court) on the Catholic church.[29] Moreover, the courts in the post-Tinker era determined that there were broad categories of speech which were protected and could not be censored from student publications. These topics included features on premarital sex and the problems of teenage sexuality, including such controversial topics as birth control and abortion,[30] articles about drug abuse including advocacy of reform

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23. Thonen v. Jenkins, 517 F.2d 3 (4th Cir. 1979).

24. Korn v. Elkins, 317 F. Supp. 138 (D.Md. 1970).

25. Joyner v. Whiting, 477 F.2d 456 (4th Cir. 1973).

26. Lee v. Board of Regents, 306 F. Supp. 1097 (W.D. Wis. 1969), aff'd, 441 F.2d 1251 (7th Cir. 1971).

27. Dickey v. Alabama State Board of Education, 273 F. Supp. 613 (M.D. Ala. 1967), dismissed as moot sub. nom, 402 F.2d 515 (5th Cir. 1968).

28. Antonelli v. Hammond, 308 F. Supp. 1329 (D. Mass. 1970).

29. Panarella v. Birenbaum, 327 N.Y.S.2d 755 (1971), aff'd, 343 N.Y.S.2d 333 (1973).

30. Shanley v. Northeast Independent School District, 462 F.2d 960 (5th Cir. 1972); Gambino, 429 F. Supp. 731; Bayer, 383 F. Supp. 1164 (E.D.N.Y. 1974), aff'd without op., 515 F.2d 504 (2d Cir. 1979).

of drug laws,[31] criticism of school policies or personnel,[32] unsigned articles,[33] material that was "offensive to good taste" or which presented a "negative" image of the school,[34] and stories on such "non-school related" topics as the draft or the war in Vietnam,[35] civil rights, integration and racism.[36]

These decisions are the direct progeny of Tinker. After almost twenty years, Tinker remained the dispositive statement on student free speech rights. In Tinker, the Supreme Court stated that students "are 'persons' under our Constitution...possessed of fundamental rights which the State must respect..."[37] Tinker made clear that absent a showing of "material and substantial interference with school work or discipline" schools could not restrain the full First Amendment

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31. Shanley, 462 F.2d 960 (5th Cir. 1972).

32. Hatter v. Los Angeles City High School District, 310 F. Supp. 1309 (C.D. Cal. 1970), rev'd, 452 F.2d 673 (9th Cir. 1971); Scoville v. Board of Education of Joliet Township High School District, 286 F. Supp. 988 (N.D. Ill. 1968), rev'd, 425 F.2d 10 (7th Cir.), cert. denied, 400 U.S. 826 (1970).

33. Jacobs v. Board of School Commissioners, 349 F. Supp. 605 (S.D. Ind. 1972), aff'd, 490 F.2d 601 (7th Cir. 1973), vacated per curiam, 420 U.S. 128 (1975).

34. Shanley, 462 F.2d 960 (5th Cir. 1972); Scoville, 286 F. Supp. 988.

35. Riseman v. School Committee of City of Quincey, 439 F.2d 148 (1st Cir. 1971); Reineke, 484 F. Supp. 1252; Zucker, 299 F. Supp. 102.

36. Leibner v. Sharbaugh, 429 F. Supp. 744 (E.D. Va. 1977).

37. Tinker, 393 U.S. 503, 511.

rights of their students.[38] That holding flowed directly from the Supreme Court's decision in West Virginia State Board of Education v. Barnett,[39] where the court stated that "educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[40]

The Supreme Court decided only one high school free speech case after Tinker. In Bethel School District No. 403 v. Fraser,[41] a seven member majority of the Court upheld a public school district's suspension of a student who used sexually suggestive puns in a speech at a school-sponsored assembly. In a convoluted opinion written by Chief Justice Warren Burger and delivered on the day of his retirement, the court suggested it was following Tinker standard by "tak[ing] into account consideration of the sensibilities of others" and upheld the punishment.[42] Bethel was an anomaly in the face of other court opinions dealing with student free expression.

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38. Id.

39. 319 U.S. 624 (1943).

40. Id. at 637.

41. _____ U.S. _____, 106 S.Ct. 3159 (1986).

42. Bethel, _____, U.S. _____, 106 S.Ct. 3159, 3164.

It was in this environment, and with this long history of judicial protection for the student press, that the Kuhlmeier arose.

III. FACTS AND PREVIOUS JUDICIAL HISTORY

The Spectrum is the student newspaper at the Hazelwood East High School in St. Louis County, Missouri. Kathy Kuhlmeier, Lee Ann Tippett and Leslie Smart were members of the staff of the Spectrum, and, during the spring semester of 1983, were students in the Journalism II class at Hazelwood East.[43] Kuhlmeier was the Spectrum's layout editor, Tippett was a news feature writer, and Smart served as a news writer and movie reviewer.[44] Hazelwood East High School was a Missouri public school, run by the Hazelwood School District, the responsibility for which was vested in an elected Board of Education.[45] Its administrators, teachers and approximately 1,800 students were governed by that Board of Education and by the Hazelwood East High School principal, Robert E. Reynolds.[46] The Spectrum was advised, prior to April 29, 1983, by Robert Stergos; after that date, another

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43. These facts are largely drawn from the findings of fact in Kuhlmeier v. Hazelwood School District, 607 F. Supp. 1450 (E.D. Mo. 1985). However, the authors have been involved in this litigation as it has evolved, and many of the facts are also drawn from personal knowledge.

44. Kuhlmeier, 607 F. Supp. 1450, 1451.

45. Id.

46. Id.

teacher, Howard Emerson, assumed responsibility as faculty advisor until the end of the 1982-1983 academic year.[47]

Students on the staff of the Spectrum enrolled in Journalism II. The primary activity of that class was to produce the Spectrum. Students enrolled in Journalism II were supposed to apply the skills they had learned in previous classes and also learn "leadership responsibilities."[48] The school allocated approximately three-quarters of the funds required to publish the Spectrum, the remaining quarter being raised through sales at 25 cents per copy.[49] While primary responsibility for the content rested with the students enrolled in Journalism II, students not in that class could submit material for publication either as articles or as letters to the editor.[50] Three years before the incident in question, the Spectrum had run an editorial entitled "The Right to Write." This editorial stated that "[b]ecause Spectrum is a member of the press and especially because Spectrum is the sole press of the student body, Spectrum has a responsibility to that student body to be fair and unbiased in reporting, to point out injustice and, thereby, guard student freedoms, and to uphold the high level of journalistic excellence. This may, at times, cause Spectrum to be unpopular with

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47. 607 F. Supp. 1450, 1450-51.

48. 607 F. Supp. 1450, 1452.

49. Id.

50. 607 F. Supp. 1450, 1453.

some. Spectrum is not printed to be popular. Spectrum is printed to inform, entertain, guide and serve the student body -- no more and, hopefully, no less."[51] In furtherance of this policy, the students involved in publishing the Spectrum at the beginning of the 1982-1983 school year published a statement of policy on September 14, 1982, that stated that "[a]ll non-by-lined editorials appearing in this newspaper reflect the opinions of the Spectrum staff, which are not necessarily shared by the administrators or faculty of Hazelwood East."[52] As a consequence of this approach, topics covered by the Spectrum in the years leading up to the Kuhlmeier litigation included teenage dating, the effects of television on children, students' use of drugs and alcohol, race relations, teenage marriage, the death penalty, the St. Louis schools desegregation case, runaways, teenage pregnancy, religious cults, the draft, school busing, and students' Fourth Amendment rights.[53]

Also of significance, the September 14, 1982 "statement of policy" stated that "only speech that 'materially and substantially interferes with the requirements of appropriate discipline' can be found to be unacceptable and therefore prohibited."[54]

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51. 607 F. Supp. 1450, 1455.

52. Id.

53. 607 F. Supp. 1450, 1453.

54. 607 F. Supp. 1450, 1455; See also, Tinker, 393 U.S. 503.

The staff of the Spectrum planned a six-page newspaper for their May 13, 1983 issue. The editors planned a two-page spread across pages 4 and 5 of the issue which would deal with articles of sensitivity and topicality to teenagers. The topics of the six articles were (1) a primarily statistical look at teenage pregnancy with a discussion of related topics including birth control and abortion; (2) a discussion of the then-controversial "squeal law" which would require federally funded clinics to notify parents when teenagers appeared seeking birth control; (3) an account of three Hazelwood East students who became pregnant with their names changed to protect the identity of the girls in question; (4) an article on the 75% failure rate of teenage marriages; (5) an article discussing teenage runaways and available sources of help for those runaways; and (6) an article discussing juvenile delinquency and the help available to deal with juvenile delinquency problems.[55] Both Mr. Stergos and his successor, Mr. Emerson were aware of the stories planned for the May 13, 1983 issue and performed their standard advisory functions in bringing that issue to the point where it was ready for publication.

When Mr. Stergos left Hazelwood East High School, he told Mr. Emerson that the Spectrum had to be submitted to the

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55. 607 F. Supp. 1450, 1457.

principal prior to publication.[56] Emerson left the galley proofs of the Spectrum for Mr. Reynolds on May 10. On May 11, during a telephone conversation at which time Mr. Reynolds reviewed the newspaper, Reynolds directed Emerson to delete pages 4 and 5 of the May 13, 1983 issue.[57] Spectrum staff members only learned that the stories had been removed upon viewing copies of the paper delivered to the school for distribution on the morning of May 13, 1983.[58] Upon protesting the decision to delete the stories to the principal, Reynolds advised the students that the articles were "too sensitive" for "our immature audience of readers."[59] Reynolds stated this his concerns revolved around the article relating to the three personal accounts of pregnant Hazelwood East students, given that there were only eight to ten students in Hazelwood East who were pregnant that year and Reynolds was concerned that the students discussed in the paper might be identifiable.[60]

Subsequent to these events, Kuhlmeier, Tippett and Smart filed suit in the United States District Court for the

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56. 607 F. Supp.. 1450, 1458.

57. 607 F. Supp.. 1450, 1459.

58. Id.

59. Id.

60. 607 F. Supp.. 1450, 1560.

Eastern District of Missouri seeking declaratory relief, damages, and injunctive relief[61] for a violation of their constitutional rights.[62] The district court ruled in favor of the school district, noting that while the Tinker decision granted students First Amendment rights which did not stop at the schoolhouse gate, those rights were "not coextensive with those of adults,"[63] and that "in the high school setting, school officials and teachers must be accorded a wide latitude over decisions affecting the manner in which they educate students."[64] The district court went on to distinguish between what it saw as two lines of cases, one line consisting of situations "where student speech or conduct acted outside of official school programs," and one line "where the speech or conduct in question occurred within the context of school-sponsored programs."[65]

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61. The claims for injunctive relief were dismissed on the grounds that they had become moot when the plaintiffs graduated from the Hazelwood East High School. Kuhlmeier v. Hazelwood School District, 596 F. Supp. 1422 (E.D. Mo. 1984).

62. The students sued pursuant to 28 U.S.C. §§ 1983, 1988, which authorize lawsuits based on a deprivation of constitutional rights, in this case the violation alleged to have occurred was based upon the students' First and Fourteenth Amendment rights.

63. Kuhlmeier, 607 F. Supp. 1450, 1462, quoting Williams v. Spencer, 622 F.2d 1200, 1205 (4th Cir. 1980).

64. Id., quoting Nicholson v. Board of Education, 682 F.2d 858, 863 (9th Cir. 1982).

65. 607 F. Supp. 1450, 1462.

The court noted that, in the second line of cases, the results had been mixed where educators attempted to prohibit student speech in school-sponsored publications.[66]

The court cited ten cases, Fraser v. Bethel School District;[67] Nicholson v. Board of Education;[68] Seyfreid v. Walton;[69] Trachtman v. Anker;[70] Gambino v. Fairfax County School Board;[71] Stanton v. Brunswick School Dept.;[72] Reineke v. Cobb County School District;[73] Frasca v. Andrews[74] Bayer v. Kinzler;[75] and Zucker v. Panitz.[76] Although Fraser was subsequently overruled by the United States Supreme Court,[77] at the time of the district court decision, only two of these cases, Nicholson and Frasca,

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66. 607 F. Supp. 1450, 1463.

67. 755 F.2d 1356 (9th Cir. 1985).

68. 682 F.2d 858 (9th Cir. 1982).

69. 668 F.2d 214 (3d Cir. 1981).

70. 563 F.2d 512 (2d Cir. 1977), cert denied, 435 U.S. 925 (1978).

71. 564 F.2d 157 (E.D. Va. 1977).

72. 755 F. Supp. 1560 (D. Me. 1984).

73. 484 F. Supp. 1252 (N.D. Ga. 1980).

74. 463 F. Supp. 1043 (E.D.N.Y. 1979).

75. 383 F. Supp. 1164 (E.D.N.Y. 1974).

76. 299 F. Supp. 102 (S.D.N.Y. 1969).

77. 478 U.S. ___, 106 S.Ct. 3159 (1986).

involved prevention of publication of a school-sponsored newspaper. Two other cases, Seyfreid and Trachtman, involve the distinguishable instances of choice of a faculty-selected play and distribution of a sex questionnaire seeking information, as opposed to dissemination of the answers. The district court, overlooking the fact that even in its so-called "second line" of cases, the students prevailed in most press-related cases, found this "second line" to be applicable, and, primarily relying on the decision of the Third Circuit in Seyfreid v. Walton,[78] which involved a high school superintendent's decision to cancel a production of the musical Pippin, found that the Spectrum was "an integral part of Hazelwood East's curriculum and not a public forum for free expression by students."[79]

An appeal by the students to the United States Court of Appeals for the Eighth Circuit followed. The case was argued eight months after the decision of the district court, and, six months after that, on July 7, 1986, the Eighth Circuit reversed the lower court's decision.[80] While for the most part the Court of Appeals accepted the facts as found by the district court, it disagreed with the conclusion of the district court flowing from those facts that the Spectrum was not a public forum. The Eighth Circuit stated that "although

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78. 668 F.2d 214 (3d Cir. 1981).

79. 607 F. Supp. 1450, 1465.

80. Kuhlmeier v. Hazelwood School District, 595 F.2d 1368 (8th Cir. 1986).

Spectrum was produced by the Journalism II class, it was a 'student publication' in every sense."[81] The appeals court felt that there was substantial evidence that the primary decisions as to the content of the paper had been made by the students, and noted that even Mr. Stergos, who preceded Mr. Emerson as adviser, had testified that it was the students' paper first and foremost and that they made most of the decisions, with Stergos reserving his input to when the students had questions of law or ethics. The Court of Appeals was also apparently impressed by the breadth of subject matter covered by the newspaper, the fact that over 4,500 copies had been sold in the 1982-1983 school year, and the policy statement it had published on September 14, 1982.[82]

Having determined that the Spectrum was a forum for public expression, the Eighth Circuit discarded the district court's formulation that school officials must only demonstrate a "reasonable basis" for the action they take,[83] and adopted the standard that a ban must be "necessary to avoid material and substantial interference with school work or discipline... or the rights of others."[84] Under the Tinker standard, the

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81. 595 F.2d 1368, 1372.

82. Id.

83. 607 F. Supp. 1450, 1466.

84. 595 F.2d 1368, 1374 quoting Tinker, 393 U.S. at 511.

Eighth Circuit analyzed the justifications enumerated for censorship, the primary reason being the concern for privacy involved in the story relating to teenage pregnancy (which used three case studies from the Hazelwood East student body), and found that the reasons advocated by the school district did not justify this censorship.[85] The Eighth Circuit stated that it was persuaded that when the Supreme Court in Tinker said that suppression of expression would be justified to protect the invasion of the rights of others, it by necessity meant to grant schools power to suppress speech only for such invasions of rights as were previously defined under the legal standards of existing tort law.[86] The court found that, because the girls involved had given their consent to be quoted in the article, because the fathers of the babies could not be identified by the articles, and because the article did not expose any details about the lives of the parents of the girls involved, there was no invasion of privacy involved.[87] Having made these findings, the United States Court of Appeals for the Eighth Circuit then remanded the case to the district court for a determination of damages.

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85. 595 F.2d 1368, 1375.

86. 595 F.2d 1368, 1375-76, citing note, Administrative Regulation of the High School Press, 83 Mich. L. Rev. 625, 641 (1984).

87. 795 F.2d 1368, 1376.

Following the decision of the Eighth Circuit Court of Appeals, the Hazelwood District applied to the United States Supreme Court for a writ of certiorari. Certiorari was granted,[88] and the case was argued in front of the Court on October 13, 1987.

IV. THE SUPREME COURT DECISION

The United States Supreme Court heard argument in Hazelwood School District, et al. v. Kuhlmeier, et al., on October 13, 1987, and rendered its decision three months to the day later.[89] By a vote of 5 to 3,[90] the Court overruled the United States Court of Appeals for the Eighth Circuit. Although the court started with the proposition from Tinker that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," they rapidly moved on to add that "the First Amendment rights of students in public schools 'are not automatically coextensive with the rights of adults in other settings.'"[91]

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88. ___ U.S. ___, 107 S.Ct. 926 (1986).

89. Hazelwood School District v. Kuhlmeier, ___ U.S. ___, 56 U.S.L.W. 4079 (1988).

90. Justice White delivered the opinion of the court, joined by Chief Justice Rehnquist, Justice Stevens, Justice O'Connor and Justice Scalia. A dissent was filed by Justice Brennan, and was joined by Justices Marshall and Blackmun.

91. Kuhlmeier, ___ U.S. ___, ___, 56 U.S.L.W. 4079, 4081, quoting Bethel School District No. 403 v. Fraser, 478 U.S. ___, 106 S.Ct. 3159 (1986).

The Court then analyzed whether the Spectrum might be characterized as a forum for public expression, and agreed with the District Court that the school had continued to exert control over the paper such that a forum could not be found to exist.[92] Having determined that the Spectrum was not in fact a public forum, the Court went on to question "whether the First Amendment requires a school affirmatively to promote particular speech."[93] In framing the question in this fashion, the Court implicitly disregarded the Spectrum's statement of policy, the Spectrum's disavowal of its views representing those of the school district, and the fact that the Spectrum raised a significant portion of its funding through sales. The Court focused instead on the provision of the remaining funds and the fact that the newspaper was produced in large part by students in a for-credit situation as evidence that the school was in fact "promoting" the contents of the newspaper.

The Court found this question to be relevant not only to the Spectrum, but, broadly expanding the issue before the Court, to all "school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[94] The Court therefore intended the

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92. ___ U.S. ___, ___, 56 U.S.L.W. 4079, 4081.

93. ___ U.S. ___, ___, 56 U.S.L.W. 4079, 4082.

94. Id.

Kuhlmeier decision to be applicable to any activity which might "fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences."[95] The Court also clearly stated that it considered public high schools to be the "publisher" of a school newspaper and the "producer" of a school play, and as such had the right to disassociate themselves from speech that is "ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences."[96]

Thus the Court took an activist approach to the Kuhlmeier decision, going beyond anything which was before it on the facts at bar. Even the petitioners in the Supreme Court had only claimed that they were concerned about an invasion of privacy issue.[97] The Court went on to structure an extremely broad standard as to what might be permissible to be censored, stating that "a school must be able to take into account the emotional maturity of the intended audience and determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting

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95. Id.

96. Id.

97. Brief of petitioners at 7-9.

to the particulars of teenage sexual activity in a high school."[98] In order to assist administrators in schools in the performance of this guardianship, the court stated that their actions need only be "reasonably related to legitimate pedagogical concerns."[99]

However, the Supreme Court did not grant universal authority over publications. It expressly reserved the question of school authority over publications which were not part of school-sponsored activities,[100] and, similarly, reserved the question as to the authority of administrators on the university and college levels.[101]

In dissent, Justice Brennan charged that the majority had essentially upset the balance of -- if not implicitly overruled -- the Tinker decision.[102] Brennan reminded the Court that it had once stated that the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" did not justify official suppression of student speech in the high school.[103] To Brennan, the Court's distinction, lifted largely from the decision of the district court,

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98. ___ U.S. ___, ___, 56 U.S.L.W. 4079, 4082 (emphasis added).

99. Id.

100. ___ U.S. ___, ___, 56 U.S.L.W. 4079, 4082 n.6.

101. ___ U.S. ___, ___, 56 U.S.L.W. 4079, 4083 n.7.

102. ___ U.S. ___, ___, 56 U.S.L.W. 4079, 4085.

103. ___ U.S. ___, ___, 56 U.S.L.W. 4079, 4084, quoting Tinker, 393 U.S. 503, 509.

between school-sponsored publications and speech which occurred in a non-sponsored or independent fashion, was an artificial distinction without prior support.[104] Brennan noted that the Court offered "an obscure tangle of three excuses" to justify their decision: "the public educator's prerogative to control curriculum; the pedagogical interest in shielding the high school audience from objectionable viewpoints and sensitive topics; and the school's need to disassociate itself from student expression."[105]

Brennan addressed particular fury to the second justification advanced by the Court, the idea that it is a school responsibility to shield impressionable high school audiences from unsuitable material. Brennan drew the court's attention to a line of decisions which he felt invalidated the presumed right of the school to act as a member of the "thought police."[106]

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104. ___ U.S. ___, ___, 56 U.S.L.W. 4079, 4085.

105. Id.

106. ___ U.S. ___, ___, 56 U.S.L.W. 4079, 4086, citing to Epperson v. Arkansas, 393 U.S. 97 (1968); Meyer v. Nebraska, 262 U.S. 390 (1923); Keyshian v. Board of Regents, 385 U.S. 589 (1967). Brennan noted that of the "three excuses," the first concern is fully addressed by the Tinker decision, the second concern is illegitimate, and the third is readily achievable through less oppressive means. Note, however, that even Justice Brennan felt that a basis exists for an educator to have the right, under Tinker, to "censor" poor grammar or writing or research because such items might materially disrupt a newspaper's curricular purpose. Id. Justice Brennan does not explain how such a censorship is compatible with the rest of the philosophy of his dissent.

Brennan also responded that the court's third rationale, its right to disassociate itself from speech, could be easily handled by requiring the newspaper to publish a disclaimer, or by issuing a response to the newspaper, either of which would be significantly less intrusive than the censorship powers granted to schools by the court.[107]

Brennan's dissent comes to the conclusion, finally, that there is no way to reconcile the Kuhlmeier decision with the Tinker decision, and that Kuhlmeier in fact at least partially overrules the case from which it claims to logically descend.[108] The question as to whether Tinker -- or any other cases relating to the high school press and its freedoms -- have been implicitly or explicitly overruled by Kuhlmeier, and the other potential impacts of Kuhlmeier, are discussed in the next section of this article.

V. THE LEGACY OF KUHLMEIER

A. Redefining Public Forums in High Schools.

As can clearly be seen in sections III and IV, three different courts took exceedingly different views as to whether or not the Spectrum qualified as a forum for public expression. It is our view that the United States District Court for the

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107. ___ U.S. ___, ___, 56 U.S.L.W. 4079, 4087, citing to Keyshian, 385 U.S. 589.

108. ___ U.S. ___, ___, 56 U.S.L.W. 4079, 4087.

Eastern District of Missouri and the Supreme Court of the United States decided this question incorrectly both as to school-sponsored student newspapers in general and the Spectrum in particular. In fact, the United States Court of Appeals for the Eighth Circuit found the Spectrum to be a forum relying on the factual findings of the District Court.[109]

There was clearly sufficient evidence to support the finding that the forum existed and that the Spectrum, like other student publications, was "conceived, established and operated as a conduit for student expression on a wide variety of topics."[110] Even the district court conceded that "students not enrolled in Journalism II could submit material for publication" and that there was a column entitled "Letters to the Editor" which was open to students who were not enrolled in Journalism II and thus did not receive credit for their material appearing in the Spectrum.[111] Also unchallenged were the facts that the Spectrum consistently covered issues of interest to the entire Hazelwood School District community, and that it raised approximately one-quarter of its income through sales.[112]

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109. 795 F.2d 1368, 1372.

110. Gambino v. Fairfax County School Board, 429 F. Supp. 731, 735 (E.D. Va.), aff'd per curiam, 564 F.2d 157 (4th Cir. 1977); see also, Student Press Law Center, Law of the Student Press, 14-15 (1985).

111. 607 F. Supp. 1450, 1453.

112. 607 F. Supp. 1450, 1452-53.

Even the Hazelwood School District's own policies clearly established that it intended Spectrum to be a forum for student expression. In Board Policy 348.5 it said, "Students are entitled to express in writing their personal opinions."[113] Board Policy 348.51 further provided that, "School sponsored student publications will not restrict free expression or diverse viewpoints within the rules of responsible journalism."[114]

The message of the school district's policies reaffirmed the experience of students who worked on the staff of the student newspaper at Hazelwood East: Spectrum was by intention and in fact a student newspaper for the presentation of student news, views and opinions.[115]

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113. Kuhlmeier v. Hazelwood School District, 607 F. Supp. 1450, 1455 (E.D. Mo. 1985).

114. Id.

115. The situation of Spectrum at Hazelwood East is comparable to other student publications which were, before Kuhlmeier, recognized as protected by the First Amendment. In Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969) the court rejected censorship of a student newspaper described by school officials as a curricular device "intended to inure primarily to the benefit of those who compile, edit and publish it." Id. at 103. Such a claim was without merit, the court said, noting that the newspaper was sold to the student body, included letters to the editor and ran stories on controversial topics. "[I]t is clear that the newspaper is more than a mere activity time and place sheet." Id. See also, Bazaar v. Fortune, 476 F.2d 570, aff'd en banc per curiam, 489 F.2d 225 (5th Cir. 1973), cert. denied, 416 U.S. 995 (1974) (literary magazine produced with the advice of a college English department and connected to a course for credit found to be a public forum); Gambino v. Fairfax

(Footnote continued on next page)

These facts should have been determinative. Many student newspapers, official or unofficial, sold or freely distributed, failed to provide the stimulation for public debate that was clearly triggered by the articles which ran in the Spectrum. Of the three courts which examined the Spectrum's status, only the Eighth Circuit focused on the concept that whether or not a publication is a forum for public expression should be based more upon how information is received and used than upon how it is produced.[116]

The Supreme Court, in its rush to find an expansive basis for handing schools tools of control, declined to make a proper analysis at this point. Rather than discussing the fact that cities and states which create parks, public squares, and courthouse steps rarely expect them to be used as forums for public expression, the Supreme Court fell back on its glib

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(Footnote continued from previous page)

County School Board, 429 F. Supp. 731, 733 (E.D. Va.), aff'd per curiam, 564 F.2d 157 (4th Cir. 1977) (high school newspaper sold to the public on which some of the staff members were enrolled in a journalism class and received academic credit for work on the newspaper); Stanton v. Brunswick School Department, 577 F. Supp. 1560 (D. Me. 1984) (high school yearbook that allowed students to include one short quote next to their photograph to be a de facto public forum). And in a factual situation difficult to distinguish from the one at Hazelwood East, the court in Reineke v. Cobb County School District, 484 F. Supp. 1252 (N.D. Ga. 1980), found the official high school newspaper to be protected from censorship. There the student editors and staff were enrolled in a journalism class for which they received academic credit, and the teacher was newspaper adviser as well as instructor.

116. See, generally, 795 F.2d 1368, 1373-74.

statement involving teacher mailboxes in Perry Education Association v. Perry Local Educator's Association, that "school facilities may be deemed to be public forums only if school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public.'"[117]

In Perry, the Supreme Court established three categories of forums under the public forum doctrine: 1) the quintessential public forum, 2) the limited public forum and 3) the non-public forum.[118] The doctrine enunciated in Perry indicated that a school-sponsored student newspaper such as Spectrum is a limited public forum.

A student newspaper is concededly not a quintessential public forum as the Court considers streets and parks to be. But, as the Supreme Court noted in Perry, a "public forum" may be created for a limited purpose such as use by certain groups.[119] The school district opened Spectrum for unrestricted access by a limited group consisting of students.[120] In stark contrast to Perry, where the school district had a written contract limiting the distribution of materials through faculty mailboxes, the Hazelwood School District's policies encouraged student

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117. ___ U.S. ___, ___, 56 U.S.L.W. 4079, 4081 quoting Perry Education Association v. Perry Local Educator's Association, 460 U.S. 37, 47 (1983).

118. Perry, 460 U.S. 37, 45-46.

119. 460 U.S. 37, 46 n. 7 (1985).

120. See Widmar v. Vincent, 454 U.S. 263 n. 5 (1981).

expression. It seems clear from the facts as laid out by the district court, and accepted by both the court of appeals and the Supreme Court, that the school established the student newspaper for use by the limited public of student staff members as a place for their expressive activity.[121]

Having misapplied Perry to a class of facility which was clearly a public forum, the Supreme Court thus provided schools with an easy mechanism for determining whether or not their student newspaper is a forum for public expression. It is clear that most schools will interpret the decision as giving them the authority to control a student newspaper unless they designate it as a public forum. As we demonstrate below, however, schools which take the route of censorship will not be doing their students or their education goals a service.

B. Social Impact of the Kuhlmeier Decision

As noted above, the Supreme Court has drawn a glib and facile box around school-sponsored publications and stated that

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121. The public forum doctrine is not the only valid method for defining and protecting student free press rights, although a Supreme Court which approved so restrictive a stance was not likely to go searching for other rationales to justify student free speech. Many lower courts relied on a pure free press analysis in protecting student journalists similar to that enumerated by the Supreme Court in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). Stanley v. McGrath, 719 F.2d 279 (8th Cir. 1984); Sinn v. Daily Nebraskan, 638 F. Supp. 143 (D. Neb. 1986); Reineke v. Cobb County School District, 484 F. Supp. 1252 (N.D. Ga. 1980); Bayer v. Kinzler, 383 F. Supp. 1164 (E.D.N.Y. 1974), aff'd. without op., 515 F.2d 504 (2d Cir. 1975).

they are not forums for public expression unless specifically designated as such. Many schools will censor as a result of this decision. We now examine the plight of students at those schools.

For students who wish to be part of a newspaper, the Kuhlmeier decision will force them to make a Hobson's Choice. For these students, the choice will be between staying with the school-sponsored publication or working for (or going out and founding) a non-official or "underground" publication.

A student who stays with the official publication will continue, in many cases, to receive credit for his or her participation. That is a value not to be underestimated in the crowded life of a teenager where demands on the teenager's time force difficult decisions. Moreover, the serious student who wishes to be a journalist, or merely wishes to learn to write better, will recognize the clear advantage in having access to a journalism adviser, particularly if that adviser has formal experience or training in writing and journalism. For students such as these, the asset of a trained teaching professional overseeing their writing and the development of their reporting skills is incalculable. The student who maintains ties with the student publication subsequent to the Kuhlmeier decision, in order to gain these advantages, will merely have to sacrifice any thoughts of absolute editorial freedom.

Conversely, a student can join an underground publication, if one exists, or seek to form such a publication. The

clear advantage to such a publication subsequent to Kuhlmeier is that it will have absolute editorial freedom. It will not be part of the school's sponsored curriculum, and will not be funded by the school. Therefore, school control will be limited to the ability of the administrators to intercept such material from being disseminated to its students on school grounds. As we discuss below, there will likely be limitations on their ability to do this. However, the student who chooses to go underground will have to sacrifice credit and educational input. Such students' sole "educators" in an underground newspaper will be students such as themselves or who are at most a year or two older. Students participating in such publications will trade away educational benefits for the right to experience journalistic rights "at their apogee."[122]

In forcing student journalists to make this choice, the Supreme Court has sent a message not merely to those journalists but to all public school students. On the one hand, the Court has told those students that the educational system exists to inculcate in tomorrow's leaders "the fundamental values necessary to the maintenance of a democratic political system."[123] The Court has also stated that public education serves to prepare the youth of our nation to deal with "our increasingly complex society and ... the duties of citizenship in our democratic

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122. Kuhlmeier, supra, 607 F. Supp. 1450, 1463.

123. Ambach v. Norwick, 441 U.S. 68, 77 (1979).

Republic."[124] The court, however, is telling students that these values must be received passively, without significant opportunity to debate on a school-wide basis the issues and concerns of the day. It blithely presumes that there will other equally efficient mechanisms such as local news media by which students in a public high school may receive the information they need to make their own choices.

This is naive. Small town newspapers frequently shy away from discussing issues of controversy relating to the children of their readership. Equally unlikely is the idea that, in a major metropolitan area, the newspaper will have the time or interest to devote sufficient space to dealing with the unique concerns of the teenage population which does not, after all, buy microwaves, sheets, new, expensive automobiles, or, even, significant numbers of the newspaper.

Resultingly, the major source of information for teenagers will be other teenagers, from whom there be no guarantee that the information provided is correct. With a student newspaper, properly supervised by a member of a high school faculty cognizant of student journalists' right to freedom of speech, there was both discussion of sensitive issues and a general guarantee of accuracy. The Supreme Court has split these components, thus weakening, if not potentially destroying, both of them. Moreover, they have sent a message to the students of America

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124. ___ U.S. ___, ___, 56 U.S.L.W. 4079, 4084 (Brennan, J., dissenting); See also Brown v. Board of Education, 347 U.S. 483, 493 (1954).

that many constitutional guarantees do, indeed, largely stop at the schoolhouse gate.[125] Students are taught that they must pay homage to the values of the Constitution even though many of those values will not be available to them until they receive their high school diploma.

The only conceivable end result of such a message is cynicism. Students who might have eagerly awaited a chance to participate in our system as adults may now turn inward to more parochial concerns. Students who might have considered careers in journalism will turn instead to other interests. These cannot be the messages which the Supreme Court seriously intended to send to the youth of America.

C. Legal Aftermath of the Kuhlmeier Decision

1. Demise of the Disruption Standard.

Prior to the Kuhlmeier decision, the Supreme Court and the lower courts had made clear that student expression could be censored only if it caused "substantial disruption."[126]

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125. See also Bethel School District No. 403 v. Fraser, 478 U.S. ___, 106 S.Ct. 3159 (1986); New Jersey v. T.L.O., 469 U.S. 325 (1985).

126. Tinker, 393 U.S. 503; see also Shanley v. Northeast Independent School District, 462 F.2d 960 (5th Cir. 1972); Scoville v. Board of Education of Joliet Township High School District, 425 F.2d 10 (7th Cir. 1970), cert. denied, 400 U.S. 826 (1970); Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966); Blackwell v. Issaquena County Board of Education, 363 F.2d 749 (5th Cir. 1966); Leibner v. Sharbaugh, 429 F. Supp. 744 (E.D. Va. 1977); Vail v. Board of Education, 354 F. Supp. 592 (D.N.H. 1973), vacated and remanded, 502 F.2d 1159 (1st Cir. 1973); Sullivan v. Houston Independent School District, 307 F. Supp. 1328 (S.D. Tex. 1969).

The Supreme Court in Kuhlmeier, however, expressed a new standard for school-sponsored publications which no longer required substantial disruption, but rather allowed editorial control over student's speech so long as the administrative action was "reasonably related to legitimate pedagogical concerns."[127]

In creating this new standard, the Supreme Court has, for school-sponsored publications, disemboweled the disruption standard without significant justification. In the two decades subsequent to the Tinker decision, there was only one litigation in which school officials were able to convince a court that a material and substantial disruption of a high school would in fact have occurred had the material been published in the school-sponsored student publication.[128] In that case, the court held that an editorial reference in the student newspaper to "hot-headed, egotistical, 'pissed-off' jocks" could have resulted in a physical disruption based on the unsupported opinion of the building principal who was the censor, the coach of athletes referred to, and an English teacher.[129]

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127. ___ U.S. ___, ___, 56 U.S.L.W. 4079, 4082.

128. Frasca v. Andrews, 463 F. Supp. 1043 (E.D.N.Y. 1979). In another case, Trachtman v. Anker, 563 F.2d 512 (2d Cir. 1977), cert. denied, 435 U.S. 925 (1978), the United States Court of Appeals for the Second Circuit held, over a persuasive dissent, the distribution of a student survey which solicited information regarding students' sexual practices met the Tinker standard for censorship. As such, the case did not involve material that a student newspaper was seeking to publish.

129. Frasca, 463 F. Supp. 1043, 1051.

Nor did the Supreme Court need to reach the issue of altering the disruption standard. There was no evidence that the articles removed from Spectrum would have disrupted classes. There was no reasonable forecast of an unwarranted invasion of privacy as a result of the stories in question.[130] As the Court of Appeals noted, consent of all those interviewed was obtained by Spectrum staffers.[131] A minor's consent is effective if he is capable of appreciating the nature, extent and probable consequences of the conduct to which he consents, even if parental consent is not obtained or expressly refused.[132] Although the school district presented witnesses at trial who claimed they could identify the students interviewed for the pregnancy story, the district presented no evidence that any of those students lacked the ability to understand the effect of their consent. Significantly, none of the students raised a complaint about the stories, which were subsequently published in their entirety in a regional newspaper.[133] The Hazelwood School District was motivated by discomfort over the discussion of teenage pregnancy

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130. As the Court of Appeals noted, to define Tinker's "invasion of the rights of others" so that it allows censorship of material that is not materially and substantially disruptive or a tortious invasion of privacy is specious. Kuhlmeier v. Hazelwood School District, 795 F.2d 1368, 1376 (8th Cir. 1986).

131. Kuhlmeier, 795 F.2d 1368, 1376.

132. Restatement (Second) of Torts, section 892A (1982).

133. "Too hot for Hazelwood", St. Louis Globe Democrat, Feb. 9, 1985 (Weekend Section), at 5.

and divorce. A blanket prohibition of such controversial topics threatens "a value at the very core of the First Amendment."[134]

It is clear that viewpoint suppression, not fear of substantial disruption, was involved in Kuhlmeier. It was the "sexual norm" of the three pregnant students, as the school district referred to it, that provided the underlying basis of the school's decision to censor.[135]

Thus, notwithstanding the fact that in twenty years the courts only once found a need to uphold the censorship of an official school-sponsored publication under the higher substantial disruption standard, and there was no evidence of interference with education as a result, the Supreme Court needlessly changed the standard to allow for total control of all speech by school administrators.

Were a concern that education was suffering under the Tinker standard well founded, common sense would indicate that high schools which have not exercised prior restraint authority, including those in states under the jurisdiction of the Seventh Circuit Court of Appeals, would be in chaos. In Fujishima v. Board of Education,[136] the Seventh Circuit held unconstitutional

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134. Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530, 548 (1980) (Stevens, J., concurring).

135. See Petitioners' brief at 34. Interestingly, petitioner's amicus, Pacific Legal Foundation, had no hesitation in noting the viewpoints suppressed. Pacific Legal Foundation brief at 15.

136. 460 F.2d 1355 (7th Cir. 1972).

a school regulation providing for prior approval and restraint of student publications to be distributed on school grounds. Yet in the years since Fujishima there has been no suggestion that high school education in Illinois, Wisconsin and Indiana has suffered because of the limitation placed on school officials. The Seventh Circuit considered it sufficient that schools have the authority to subsequently punish students for activity that had created a material disruption. Moreover, it left the option open for school officials to seek injunctive relief when they anticipate that a situation warrants the extreme and immediate action of prior restraint. Yet no indication exists that even once in 16 years has a single school official in any of the three states taken advantage of this avenue.

The Supreme Court took an approach almost diametrically opposed to that adopted by the Seventh Circuit. While this clearly will prevent school-sponsored publications from ever again interfering with the educational process, in light of the past case law, and past experience, it is clearly using an atom bomb to swat a fly.

2. The Creation of a Two-Tiered Student Press.

Nor is it clear that every paper which schools might perceive as school-sponsored are in fact within the ambit of the Kuhlmeier decision. Not all student newspapers are as clearly inside or outside the box which the Supreme Court, adopting the facile distinction drawn by the United States District Court

for the Eastern District of Missouri, has drawn as one might at first be led to believe.

It is, for example, not clear under the Kuhlmeier decision what level of support or institutional involvement is required before a publication is perceived "to bear the imprimatur of the school."[137] What does it mean, as a legal matter, to be "school-sponsored?" It is unclear whether an after-hours club would be determined to be producing a school-sponsored paper simply because it was supervised by a teacher or because it was receiving some school funds which incidentally helped to produce the newspaper.

Schools might attempt to clarify these questions in light of the Kuhlmeier decision by designating all student publications non-forums. To do this, schools might try and change currently independent newspapers they now label as forums or newspapers produced by clubs into newspapers labeled non-forums, produced within a class for credit and under the supervision of a faculty member. Although the Kuhlmeier decision greatly expands the powers of the school, it is far from clear that the school could successfully convert a newspaper from forum status to the status of official, non-forum publication.

It is arguable that to attempt to change the status of a newspaper solely to gain control over its content could be analogized to other actions which have been taken by high school

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137. ____, U.S. ____, ____, 56 U.S.L.W. 4079, 4082.

principals and college presidents in the past to indirectly control the content of student publications. Attempts to gain control over content of a newspaper by withdrawing financial support for that newspaper or by dismissing the editors when the administration of an educational facility would not otherwise have control over the content of the newspaper have been uniformly rejected as unconstitutional exercises of power.[138] In each of these cases, an attempt was made by a college president or a high school principal to control content using mechanisms other than the editorial process. In each of these cases, the ability to do so was swiftly and unconditionally rejected by the courts. In light of this, it would seem that attempts to convert a publication from forum to non-forum for the stated or intended purpose of gaining editorial control over the publication would likewise be found to be unconstitutional.

3. The Liability Factor.

Moreover, there is a good reason why public institutions would not want control over the student publication. It may be stated simply: Those who control a publication will have financial responsibility for tortious material published in that

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138. Schiff v. Williams, 519 F.2d 257 (5th Cir. 1975); Thonen v. Jenkins, 517 F.2d 3 (4th Cir. 1975); Joyner v. Whiting, 477 F.2d 456 (4th Cir. 1973); Reineke v. Cobb County School District, 484 F. Supp. 1252 (N.D. Ga. 1980); Trujillo v. Love, 322 F. Supp. 1266 (D. Colo. 1971); Antonelli v. Hammond, 308 F. Supp. 1329 (D. Mass. 1970); Dickey v. Alabama State Board of Education, 273 F. Supp. 613 (M.D. Ala. 1967), dismissed as moot sub. nom., 402 F.2d 515 (5th Cir. 1968).

publication. The determination of whether or not such an agency relationship exists is based on a three-pronged analysis: 1) consent, 2) benefit and 3) right of control.[139]

The Supreme Court has recognized, in a slightly different context, the principle that officials who followed the dictates of the First Amendment cannot be held financially liable for the torts of others. In Farmers Educational & Cooperative Union v. WDAY, Inc.,[140] the Court held that broadcasting stations licensed by the Federal Communications Commission are barred from removing defamatory statements contained in speeches by candidates for public office. If such censorship were permissible, the court said, "a station so inclined [could] intentionally inhibit a candidate's legitimate presentation under the guise of lawful censorship of libelous matter."[141] Once the legal inability to censor was recognized, the court went on to state that the licensee would enjoy immunity from liability. To do otherwise, the court noted, would allow the "unconscionable result" of permitting liability to be imposed for the very conduct the law demands.[142] "Quite possibly, if a station were held responsible for the broadcast of libelous material [of political

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139. Restatement (Second) of Agency ¶ 1 (1957).

140. 360 U.S. 525 (1959).

141. 360 U.S. 525, 530.

142. 360 U.S. 525, 531.

candidates], all remarks even faintly objectionable would be excluded out of an excess of caution."[143]

At least two courts have specifically applied this rationale to student newspapers at public institutions of higher education. When the crucial control element is missing, that is when a public school follows the constraints placed on it by the First Amendment and does not exercise content control of the student newspaper, the school is immune from liability.[144] Thus an educational institution which refrains from censorship protects itself from financial liability for torts that constitutionally and educationally they should be in no position to prevent. To convert a student newspaper that is a forum for student expression after Kuhlmeier into a non-forum publication could be a serious financial mistake.

4. Questions Remaining After Kuhlmeier.

Although Kuhlmeier appears to be a tsunami which washes all before it, upon closer inspection it is clear that quite a bit remains to protect the student journalist in his or her exercise of free speech.

For example, the Supreme Court explicitly reserved the question as to whether a student publication on the college or university level had protection from the degree of deference

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143. 360 U.S. 525, 530.

144. Milliner v. Turner, 436 So. 2d 1300 (La. Ct. App. 1983); Mazart v. State, 441 N.Y.S. 2d 600 (N.Y. Ct. Cl. 1981).

which was granted to secondary school administrators in Kuhlmeier.[145] Although many university administrators may attempt to use Kuhlmeier as a green light for censorship in higher education, it appears likely that the courts will use Kuhlmeier's footnote 7 to limit its impact to the high school level. The reasons for doing so will include the age of the newspaper reporters; the concomitantly higher age of the newspaper recipients; the increased independence generally granted to students in higher education; and the acknowledgement that such students are, in fact, young adults with full legal rights in our system (save, in most states, the right to drink).

Likewise, it seems clear that Kuhlmeier is limited by its own terms only to publications which are sponsored by the secondary school institution. Therefore, it should be read as excluding from administrative power any newspaper which is "underground" or independent.[146]

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145. ___ U.S. ___, ___, 56 U.S.L.W. 4079, 4083 n.7.

146. Support for the idea that underground newspapers are not included in the ambit of the Kuhlmeier decision is the statement by the Supreme Court at 56 U.S.L.W. 4079, 4082 n.3 that the distinctions they draw in permitting control of curriculum are fully consistent with their decision involving a university-level underground newspaper in Papish v. Board of Curators, 410 U.S. 667 (1973). Equally persuasive is the Court's suggestion at 56 U.S.L.W. 4079, 4082 n.6 that "[w]e need not now decide whether such [specific written] regulations are required before school officials may censor publications not sponsored by the school that students seek to distribute on school grounds." Thus, the Supreme Court has presumptively left valid the decisions in Baughman v. Freinmuth, 478 F.2d 1345 (4th Cir. 1973); Shanley v. Northwest Independent School District, 462 F.2d 960 (5th Cir. 1972); and Eisner v. Stamford Board of Education, 440 F.2d 803 (2d Cir. 1971), and other underground publication cases.

Thus, in the post-Kuhlmeier world, publications at institutions of higher education and independent publications in secondary schools retain, for the time being, extensive First Amendment protections. College and university publications still may not be censored, and the voices of independent secondary school publications can only be limited when appropriate due process is afforded.[147] The First Amendment requires that speech restrictions be "narrowly drawn."[148] For such regulations to escape a void-for-vagueness determination (and certainly the Supreme Court's formulation that censorship which is only "reasonably related to legitimate pedagogical concerns" would have been found void-for-vagueness if it were expounded by a school board as part of a regulation), the regulations must be enumerated with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[149]

Prior restraint regulations, if they are to exist at all,[150] must meet certain minimal requirements. Regulations must

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147. Gambino, 429 F. Supp. 731; Nitzberg v. Parks, 525 F.2d 378, 383 (4th Cir. 1975).

148. In re Primus, 436 U.S. 412, 438 (1978).

149. Kolender v. Lawson, 461 U.S. 352, 357 (1983).

150. Fujishima v. Board of Education, 460 F.2d 1355 (7th Cir. 1972), still prohibits prior review of independent publications in the Seventh Circuit.

offer criteria and specific examples so that students will understand what expression is proscribed.[151] They must detail the criteria by which an administrator might reasonably predict the occurrence of "substantial disruption."[152] The regulations must provide definitions of all key terms used, such as "defamatory."[153] Students must be given the opportunity to know that such rules exist; the regulations must be included in the official school publications or circulated to students in the same manner as other official material.[154] These publication guidelines also must specify to whom the material is to be submitted for approval,[155] and give the students the right to a prompt hearing before the decision-maker where they can argue why distribution should be allowed.[156] Procedural due process also requires that publication guidelines limit the time in which the official has to reach a decision on whether to prevent distribution, provide

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151. Nitzberg v. Parks, 525 F.2d 378, 383 (4th Cir. 1975); Baughman v. Freienmuth, 478 F.2d 1345, 1349 (4th Cir. 1975); Shanley v. Northeast Independent School District, 462 F.2d 960, 976 (5th Cir. 1972).

152. Nitzberg, 525 F.2d 378, 383.

153. Hall v. Board of School Commissioners, 681 F.2d 965, 971 (5th Cir. 1982); Nitzberg, 525 F.2d 378, 383; Shanley, 462 F.2d at 977.

154. Nitzberg, 525 F.2d 378, 383.

155. Eisner v. Stamford Board of Education, 440 F.2d 803, 811 (2d Cir. 1971).

156. Leibner v. Sharbaugh, 429 F. Supp. 744 (E.D. Va. 1977).

for the contingency of an administrator failing to issue a decision within that reasonably time, and include an expeditious procedure for appealing that administrator's decision.[157] These requirements ostensibly survive Kuhlmeier and provide a guarantee of vitality for the independent student press on the high school level.

Notwithstanding the above, not all in the outlook for the student press is rosy in the aftermath of Kuhlmeier. It is clear that a significant portion of precedent from the last twenty years has been overruled by the decision. It would be hard to argue that there is any vitality in decisions which state that high school administrators do not have the power to control the content of non-forum school-sponsored publications, or that school administrators do not have the authority to have a prior review of a school-sponsored newspaper before it goes to publication.[158] While these cases have been overruled, it is equally clear that cases which have provided considerable protection for

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157. Hall v. Board of School Commissioners, 681 F.2d 965, 969 (5th Cir. 1982); Baughman v. Freienmuth, 478 F.2d 1345, 1348 (4th Cir. 1975); Shanley v. Northeast Independent School District, 462 F.2d 960, 977 (5th Cir. 1972); Quarterman v. Byrd, 453 F.2d 54, 59 (4th Cir. 1971); Eisner v. Stamford Board of Education, 440 F.2d 803, 810 (2d Cir. 1971); Leibner v. Sharbaugh, 429 F. Supp. 744, 749 (E.D. Va. 1977).

158. Reineke v. Cobb County School District, 484 F. Supp. 1252 (N.D. Ga. 1980); Gambino, 429 F. Supp. 731; Bayer v. Kinzler, 383 F.Supp. 1164 (E.D.N.Y. 1974), aff'd without op., 515 F.2d 504 (2d Cir. 1975); Koppell v. Levine, 347 F. Supp. 456 (E.D.N.Y. 1972); Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969).

the student press and which relate to non-school-sponsored publications retain their vitality. Thus, Fujishima v. Board of Education[159] stands for the continued proposition that in Illinois, Indiana and Wisconsin, a system by which public high school administrators would review publications other than the school-sponsored publication prior to distribution would be unconstitutional on its face and unenforceable.

5. State Law Approaches.

Finally, it must not be forgotten that even though Kuhlmeier has swept away much of the federal law of the last twenty years in this field, there exists a layer of state regulation and case law which also serves in many jurisdictions to expand and retain the protections of the student press including school-sponsored publications. For example, the state of California has statutorily protected the rights of the student press.[160] This statutory protection, which prevents

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159. 460 F.2d 1355 (7th Cir. 1972).

160. California Education Code ¶ 48907 states:

> Students of the public schools shall have the right to exercise freedom of speech and of the press including, but not limited to, the use of bulletin boards, the distribution of printed materials or petitions, the wearing of buttons, badges, and other insignia, and the right of expression in official publications, whether or not such publications or other means of expression are supported financially by the school or by use of school facilities, except that expression shall be prohibited which is obscene,

(Footnote continued on next page)

school administrators from interfering with the exercise of a free press by secondary students in the state of California, retains its vitality subsequent to Kuhlmeier.

Likewise continuing in their vitality are decisions of various state supreme courts which have taken the position that state constitutions can and do grant more expansive free speech rights than those which are ensured by the federal Constitution. Although these cases have not specifically dealt

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(Footnote continued from previous page)

> libelous, or slanderous. Also prohibited shall be material which so incites students as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school.
>
> Student editors of official school publications shall be responsible for assigning and editing the news, editorial, and feature content of their publications subject to the limitations of the section. However, it shall be the responsibility of a journalism advisor or advisers of student publications within each school to supervise the production of the student staff, to maintain professional standards of English and journalism, and to maintain the provisions of this section.
>
> There shall be no prior restraint of material prepared for official school publications except insofar as it violates this section. School officials shall have the burden of showing justification without undue delay prior to any limitation of student expression under this section.
>
> "Official school publications" refers to material produced by students in the journalism, newspaper, yearbook, or writing classes and distributed to the student body either free or for a fee.
>
> Nothing in this section shall prohibit or prevent any governing board of a school district from adopting otherwise valid rules and regulations relating to oral communication by students upon the premises of each school.

with the student press, some have been decided on the grounds of forum theory, and all have viewed their state constitutions as enhancing situations and places in which people can speak and enlarging what people may say in those places.[161]

It seems that statutes such as those passed by California and case law such as that in Pennsylvania, Washington, New Jersey and California will offer the best hope for the expansion of rights for the student press in the years ahead. While judicial decisions are difficult to generate, persons seeking to expand the rights of the officially sponsored student press may approach their local school boards or their state boards of education or their legislatures for aid in enacting policies or statutes similar to the one in California. Such legislative enactments would go a long way toward blunting the problems created by Kuhlmeier and the resulting loss of free speech in the pluralistic society that is an American high school.

VI. CONCLUSION

The majority of newspapers in America are student newspapers. The majority of journalists in American are student journalists. The overwhelming bulk of these student journalists

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161. Commonwealth v. Tate, 432 A.2d 1382 (Pa. 1981); Alderwood Associates v. Washington Environmental Council, 96 Wash. 2d 230, 635 P.2d 108 (1981); State v. Schmid, 84 N.J. 535, 423 A.2d 615 (1980); Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 153 Cal. Rptr. 854, 592 P.2d 341 (1979).

do not receive pay. Rather, they participate in journalism for the education, the experience, the ability to improve their skills, and the lessons they can learn both from the individual stories that they cover and the overall process of newspaper production. Those lessons are best learned in an environment as free as possible from censorship. The Kuhlmeier decision is unquestionably a serious step backwards. However, it is not the end of the debate. As we have made clear, many student publications remain unaffected by Kuhlmeier and many more can be protected through state and local rather than federal mechanisms. Keeping this in mind, there is no reason to believe that student journalism will not remain a valid and vital force in the years ahead as long as its contributors continue to stand up for what they believe in and to speak about the great issues that affect their constituencies.

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